

United States Court of Appeals
for the Fifth Circuit

United States Courts
Southern District of Texas
FILED

January 05, 2024

Nathan Ochsner, Clerk of Court

No. 23-20163

United States Court of Appeals
Fifth Circuit

FILED

January 5, 2024

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRIAN SWIENCINSKI,

Defendant—Appellant,

CONSOLIDATED WITH

No. 23-20326

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

SCOTT BREIMEISTER,


Defendant—Appellant.

No. 23-20163
c/w No. 23-20326

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CR-368-1
USDC No. 4:18-CR-368-2

ORDER:

IT IS ORDERED that Appellee's unopposed motion to view and obtain sealed documents is GRANTED.



KURT D. ENGELHARDT
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-20163

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRIAN SWIENCINSKI,
Defendant-Appellant.

CONSOLIDATED WITH NO. 23-20326

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SCOTT BREIMEISTER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:18-cr-368

UNITED STATES' MOTION FOR ACCESS TO SEALED DOCUMENTS

Pursuant to Federal Rule of Appellate Procedure 27 and Fifth Circuit Rule 27.1.20, the United States of America, by and through undersigned counsel, hereby respectfully moves for access to the sealed portions of the electronic records on appeal

in case numbers 23-20163 and 23-20326. In support of this motion, counsel states the following:

1. Defendant-Appellants Brian Swiencinski (“Swiencinski”) and Scott Breimeister (“Breimeister”) have filed interlocutory appeals challenging the district court’s denial of their motions to dismiss a superseding indictment charging them with various healthcare fraud-related offenses on double-jeopardy grounds. Defendant-Appellants contend that the Fifth Amendment’s Double Jeopardy Clause bars their retrial following the district court’s declaration of a mistrial during their first trial, on December 13, 2022, after jeopardy attached when the jury was sworn in on November 9, 2022. Swiencinski and Breimeister were tried jointly before the United States District Court for the Southern District of Texas, Houston Division, and their interlocutory appeals to this Court have been consolidated under case numbers 23-20163 (Swiencinski) and 23-20326 (Breimeister).

2. Swiencinski filed his opening brief on December 21, 2023, and Breimeister filed his opening brief on December 26, 2023. The government’s answering brief is presently due on January 26, 2024.

3. The electronic records in these consolidated cases include sealed documents that bear on the issues raised on appeal, including, but not limited to: a sealed joint defense filing in which Breimeister outlined the circumstances under which he would consent to a mistrial, *United States v. Swiencinski et al.*, No. 4:18-cr-368 (S.D. Tex.), Dkt. No. 385; and several sealed filings submitted by the government detailing

the processes and findings of the government's internal investigation into the circumstances that lead to the mid-trial discovery disclosures that ultimately resulted in the district court declaring a mistrial, *see, e.g., United States v. Swiencinski et al.*, No. 4:18-cr-368 (S.D. Tex.), Dkt. Nos. 411, 508.

4. In order to have access to the complete record and to cite to the proper ROA numbers, the United States respectfully requests permission to access all sealed documents contained in the records on appeal in both case number 23-20163 and case number 23-20326, for purposes of preparing the Government's answering brief in these consolidated cases.

5. Counsel for Defendant-Appellant Breimeister similarly moved (without opposition from the government) and obtained access to sealed materials in the record on appeal in his case. *See* Case No. 23-20326, Dkt. No. 37 (unopposed motion to view and obtain sealed documents) & Dkt. No. 43 (order granting motion). Moreover, in his opening brief on appeal, Breimeister cited and extensively quoted portions of the above-referenced sealed joint defense filing that was docketed in the district court as Dkt. No. 385. *See* Case No. 23-20326, Dkt. No. 50 (Breimeister Opening Brief) at 28-31. Although that document was filed *ex parte* on the district court's docket for unclear reasons, the government was given access to it before submitting its omnibus response in the district court to the defendants' double-jeopardy related motions. *See United States v. Swiencinski et al.*, No. 4:18-cr-368 (S.D. Tex.), Dkt. No. 479 at 3 & n.1, 9-10 & n.7. The government also intends to cite and quote that document in its answering brief on

appeal in this Court, as it is relevant to the government's argument that Breimeister consented to the mistrial and thus waived or forfeited double-jeopardy protections. The government therefore requests access to that sealed document, in addition to all other non-*ex parte* sealed documents, as well as all sealed filings submitted *ex parte* by the United States.

6. Counsel for Defendant-Appellants Swiencinski and Breimeister have represented to undersigned counsel that they do not oppose the relief requested in this motion.

For the foregoing reasons, the United States requests that it be granted access to the sealed portions of the electronic records on appeal in case numbers 23-20163 and 23-20326, including the specific above-described sealed filings, for purposes of preparing the government's answering brief.

Respectfully submitted,

/s/ Samantha P. Bateman
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CERTIFICATE OF SERVICE

I, Samantha P. Bateman, hereby certify that, on January 4, 2024, I electronically filed the foregoing Motion for Access to Sealed Documents with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit using the CM/ECF system, which will serve that filing on all counsel of record in the above-captioned cases.

/s/ Samantha P. Bateman

Samantha P. Bateman
Appellate Counsel
U.S. Department of Justice
Fraud Section, Criminal Division

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit limitation of Fed. R. App. P. 27(d)(2) because it contains 653 words, excluding any parts exempted by Fed. R. App. P. 27(a)(2)(B).
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Garamond, 14-point font for text.

/s/ Samantha P. Bateman
Samantha P. Bateman
Appellate Counsel
U.S. Department of Justice
Fraud Section, Criminal Division

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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January 05, 2024

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-20163 USA v. Swiencinski
 USDC No. 4:18-CR-368-1
 USDC No. 4:18-CR-368-2

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk
504-310-7651

Ms. Samantha Bateman
Mr. Brandon Nelson McCarthy
Ms. Carmen Castillo Mitchell
Mr. Nathan Ochsner
Ms. Rachel Malone Riley
Mr. Jeremy Raymond Sanders
Mr. Josh Barrett Schaffer
Mr. Robert Thomas Smith
Mr. Michael A. Villa Jr.